Filed 10/27/16 P. v. Buffin CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CHANDLER BUFFIN,<br>Defendant and Appellant. | A146382<br><br>(Contra Costa County<br>Super. Ct. No. 05-140993-7) |

Defendant Chandler Buffin appeals from his convictions for inflicting corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)), battery causing serious bodily injury (*id.*,§§ 242, 243, subd. (d)), and misdemeanor false imprisonment (*id.*, §§ 236, 237, subd. (a)). He contends (1) it was error to allow a police officer to testify as an expert witness on offensive and defensive injuries, (2) the trial court erred in admitting evidence of prior uncharged acts of domestic violence, (3) the prosecutor misled the jury about the reasonable doubt standard, and (4) one of the jury instructions on self-defense misstated the law. We conclude none of these contentions has merit and affirm.

## BACKGROUND

Defendant's convictions arose out of an altercation with his wife Pamela on August 22, 2013. At trial, Pamela described the incident as follows. On the morning of August 22, she woke to defendant pulling her out bed and slapping her in the face. He also put his hands on Pamela's neck, but did not squeeze. Defendant had been using Pamela's phone, and he yelled at her and said it contained proof she had been cheating on him.

Defendant then went into the garage. Pamela followed because she wanted to get her phone back. Pamela touched defendant as she reached for the phone, but did not hit him. Defendant wanted Pamela to admit she had cheated on him. Pamela said she had seen another man while she and defendant were separated, and she was not ashamed of it. Defendant became "very angry," and began throwing things at Pamela, including computer games, a model car, a broomstick, and a heavy ashtray. The model car missed Pamela and shattered a garage window. Pamela "screamed bloody murder" and yelled for help.

After defendant stopped throwing things, he said, "I should kill you for this." Pamela decided she needed to get out of the garage. To do so, she got closer to defendant, as he was blocking the exit. Defendant jumped on her, pushed her to the ground, pinned her arms with his knees, and slapped her. Pamela yelled that she could not breathe, and attempted to roll to her stomach. Defendant told Pamela to shut up, placed his arm around Pamela's neck, and put her in a "bear hug." Pamela lost consciousness.

Pamela awoke on the ground, flat on her back, spread eagle. Defendant was sitting in a chair next to her, looking through her phone. Pamela said: "You just tried to kill me." She then tried to get her phone back, and the two started "tussling again." Pamela was not then aware of the danger she was in, and she was thinking that, without her phone, she would not have a means of calling the police. She also worried about defendant having access to information about her business clients. At one point, Pamela grabbed a golf club and threatened to hit defendant with it. Defendant put her phone down and walked out of the garage.

Pamela followed defendant into the house with the golf club and went into the room of the couple's son. As she was trying to get the boy out of bed, defendant entered. Pamela motioned with the golf club, and defendant left the room. He then jumped in his truck and drove away. Pamela got into her car with her son and followed. She called 911 and read defendant's license plate number to the dispatcher. Pamela then went to a nearby police station and reported the incident.

At trial, defendant testified in his own defense. He said he became upset after he looked through Pamela's phone and found evidence she had sex with another man. He woke her by shoving her and calling her a cheater and a liar. Defendant claimed Pamela got up and lunged for her phone. He went into the garage because his son was asleep in the other room and he sensed the situation was about to escalate. According to defendant, Pamela followed and began swinging at him in an attempt to get her phone back. Defendant said he grabbed Pamela to try to keep her from hitting him. The two struggled and "eventually made it to the ground." After holding Pamela down for a while, defendant let her up because he "didn't want to be down there in the first place." Pamela became "aggressive" again, hitting defendant on the side of his face and arms. Defendant put her in another bear hug. Pamela said she could not breathe and defendant loosened his grip. Defendant testified: "Pam was so infuriated, from my perspective I made it where she could breathe, but she was so exhausted in trying to get out she seemed like she got worked up and fainted." Pamela woke up after around 30 seconds and started throwing things at defendant. Defendant threw toys back at her and broke a window. He eventually put down Pamela's phone and went back into the house.

Later that day, defendant went to the police station, claiming he was the victim of an assault. The police arrested him and took photos of his injuries.

Defendant was eventually charged by amended information with inflicting corporal injury on a spouse (Pen. Code, § 273.5, subd. (a); count one), battery causing serious bodily injury (*id.*, §§ 242, 243, subd. (d); count two), criminal threats (*id.*, § 422; count three), and false imprisonment by violence (*id.*, §§ 236, 237, subd. (a); count four). As to count one, the information further alleged defendant inflicted great bodily injury (*id.*, §§ 12022.7, subd. (e), 13700, subd. (b)).

At trial, Detective Krista Sansen testified as an expert in the area of defensive tactics, including offensive and defensive injuries. She stated the injuries to defendant were consistent with offensive injuries, while Pamela's injuries appeared to be defensive in nature.

The trial court also admitted evidence of prior incidents of domestic violence by defendant against Pamela. These incidents occurred between sometime in 1999 and May 2013.

Defendant's ex-wife Rhonda also testified to domestic violence between 1986 and 1994. During this period, defendant repeatedly abused her. In 1987 or 1988, defendant flicked lighter fluid on Rhonda's shirt and then lit a flame near her. In the early 1990's, defendant hit her upside the head with a four-to-five-pound telephone. Rhonda had to visit the emergency room, and the hearing in her left ear has been muffled since the incident. Defendant choked or strangled her twice. On another occasion, Rhonda pointed her finger at defendant, and he "balled it up like it was a piece of paper." The finger is still disfigured today. Defendant also punched Rhonda in the eye. In yet another incident, Rhonda argued with defendant as she was holding a knife and defendant twisted her wrist and squeezed her hand on the blade of the knife, injuring a tendon. Rhonda fell to the ground and defendant kicked her in the head repeatedly. Rhonda can no longer use her thumb and she has no feeling in it.

Rickey Rivera testified as an expert in the area of domestic violence. He said victims of domestic violence typically experience a "cycle of violence." During the first stage of the cycle, the tension builds and the victim "walk[s] on eggshells" and "tr[ies] to agree with everything that the abuser is saying and . . . avoid any kind of conflict." Acute battery occurs in the second phase of the cycle. The third phase is the "honeymoon phase." During this time, most of the abuse stops and the abuser is apologetic. Rivera explained: "[I]t's a—it's a safer time, it's a better time, until you get into the next phase, which is the tension building phase again."

The jury found defendant guilty of inflicting corporal injury on a spouse and battery causing serious bodily injury, and found true the great bodily injury enhancement. It found him not guilty of criminal threats. As to the false imprisonment by violence charge, it found him guilty of the lesser included offense of misdemeanor false imprisonment. The trial court sentenced defendant to five years in prison.

## DISCUSSION

***Expert Testimony***

Detective Sansen opined defendant's wounds were consistent with offensive injuries, while Pamela's wounds were likely the result of defensive injuries. As he did in the trial court, defendant contends Sansen was not sufficiently qualified as an expert in the area of offensive and defensive injuries.

Expert testimony is admissible if it "is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code,[1] § 801, subd. (a).) A witness is qualified to testify as an expert if he or she "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (§ 720, subd. (a).) "[T]he qualifications of an expert must be related to the particular subject upon which he is giving expert testimony." (*People v. Hogan* (1982) 31 Cal.3d 815, 852.) A trial court's ruling on the question of an expert's qualifications will be upheld absent an abuse of discretion, which will only be found where the evidence shows " 'a witness *clearly lacks* qualifications as an expert . . . .' " (*Ibid.*)

Defendant maintains Sansen lacked the training or experience to be qualified as an expert on offensive and defensive injuries. During voir dire, Sansen stated she did not have any specific training on distinguishing between offensive and defensive injuries. When asked whether she acquired her knowledge through experience, Sansen replied: "I would more call it common sense." Sansen also conceded she has not taken any biology or physiology classes since high school, and she has not performed any research in the area.

However, Sansen has been a defensive tactics instructor since 2003, and she has had over 250 hours of training in that field. She testified that, as an instructor, she has become familiar with combative wounds. According to Sansen, offensive injuries are sustained to the areas of the body that are used to strike, such as the palm of the hands,

[1] All further statutory references are to the Evidence Code.

fingers, elbows, knees, and hard surfaces. She also said she has received instruction on strangulation and carotid artery restraint, such as the bear hug defendant applied to Pamela. Based on this experience, the trial court had a rational basis for qualifying Sansen as an expert on offensive and defensive wounds.

Even if the trial court erred in admitting Sansen's testimony, the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818. Under the *Watson* standard, reversal is not required unless it is reasonably probable the jury would have reached a result more favorable to defendant absent the error. (*Id.* at p. 837.) This was not a close case. Even without Sansen's testimony, there was more than ample evidence to support a finding Pamela's injuries were caused by defendant. Pamela testified at length about how defendant attacked her and placed her in a choke hold. She also described other instances of domestic violence inflicted by defendant. Defendant's ex-wife testified she suffered a similar pattern of abuse, including two instances when she was choked by defendant. Moreover, defendant admitted to shoving Pamela, calling her a cheater, taking her phone, restraining her, and placing her in bear hug. Defendant's claim that Pamela fainted while in the bear hug—not because he was cutting off her air or circulation, but because she "got worked up" and "exhausted"—is implausible and was understandably rejected by the jury.

***Prior Acts of Domestic Violence***

As we have recited, the trial court admitted evidence of prior acts of domestic violence against his ex-wife Rhonda. While acknowledging this evidence comes within section 1109, which allows evidence of other domestic violence as proof of the defendant's propensity to commit acts of domestic violence, defendant maintains the evidence should have been excluded because it was too old and more prejudicial than probative. He also contends the prosecutor urged the jury to punish defendant for his past acts during closing arguments. Finally, he asserts section 1109 is unconstitutional.

The admission of Rhonda's testimony was the subject of a contested in limine motion. As discussed, Rhonda testified defendant repeatedly abused her when they were married between 1986 and 1994. Among other things, defendant hit Rhonda in the head

with a telephone, choked her on two occasions, broke her finger, and severely injured her thumb. The prosecution also introduced into evidence, over defendant's objection, a 1991 written statement Rhonda made to the police concerning defendant's abuse, in which she asserted defendant had a bad temper and had hit her over 50 times.

The prosecutor referenced this evidence during closing arguments. He also discussed the trial court's instruction on section 1109 and the purpose of the statute, stating: "The Legislature passed a special law, . . . which says, domestic violence is different. It recognizes that patterns of behavior are real. The cycle of domestic violence that the expert talked about, the stages and how the pattern repeats over and over again, that is a proven scientific reality. That's why there is what we learned about a zero tolerance policy." When discussing battered women's syndrome, the prosecutor remarked: "And I want to go back to what both Pam and Rhonda said about how they put up with this for so long, thought that there was something wrong with themselves, thought they deserved this, thought this was normal. And that's why they put up with the abuse. That's why they didn't report it. That's why he's gotten away with this for thirty years."

Generally, evidence of a person's character is inadmissible when offered to prove his or her conduct on a specified occasion. (§ 1101.) Section 1109 provides an exception to this rule and states, in pertinent part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (§ 1109, subd. (a).) Under section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) Evidence of domestic violence occurring more than 10 years before the charged offense is inadmissible under section 1109, unless the trial court "determines that the admission of this evidence is in the interest of justice." (§ 1109, subd. (e).)

Pointing out the abuse of Rhonda occurred more than 10 years prior to the charged offense, defendant claims the trial court erred by admitting the evidence without an express finding the interest of justice exception applied. The interest of justice exception applies "where the trial court engages in a balancing of factors for and against admission under section 352 and concludes, . . . that the evidence was 'more probative than prejudicial.' " (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539–540.) Contrary to defendant's claim, the trial court engaged in that analysis here. In ruling on defendant's renewed objection to Rhonda's testimony, the trial court stated: "In doing a [section] 352 analysis I think this type of matter is always prejudicial, that's not really the only inquiry. It's whether the probative value outweighs the prejudicial value. And my conclusion was that it does, based on . . . the fact that there's a pattern that is very similar. [¶] And although those incidents are from the . . . early and mid 1990s, I think there is sufficient pattern with both individuals that it makes it very probative, and more probative than prejudicial."

Defendant next contends the evidence concerning his abuse of Rhonda was significantly more prejudicial and inflammatory than the charged offenses because Rhonda suffered permanent physical injuries, while Pamela did not. But as the trial court found, there were similarities between the abuse of Pamela and Rhonda. Moreover, defendant glosses over the violence of the conduct giving rise to the charges against him. Defendant woke Pamela by yelling, slapping her, putting his hands around her neck, and pushing her out of bed. He cornered Pamela in the garage, threw various items at her, including a heavy ashtray, and said he should kill her. When Pamela tried to leave, defendant put her in a bear hug, causing her to lose consciousness. Defendant only backed off after Pamela retrieved a golf club. Defendant's abuse of Pamela was sufficiently serious that allowing the evidence of the abuse of Rhonda, was not an abuse of discretion.

Defendant also asserts the prosecution's closing arguments caused the jury to punish him for the abuse of Rhonda, rather than the charged offenses. Specifically, defendant takes issue with the prosecutor's assertion the instruction on section 1109

represented a "zero tolerance policy" that did not exist when Rhonda was abused. Defendant also asserts the prosecutor crossed the line when he argued defendant had " 'gotten away with it' for thirty years." To begin with, defendant waived these assertions by failing to object below. In any event, they are meritless. The prosecutor did not ask the jury to convict defendant based on past acts alone. Nor did he argue defendant deserved to be punished for his abuse of Rhonda. He merely argued the patterns of abuse suffered by Rhonda and Pamela were similar, and defendant's prior acts could be used to infer he had a propensity to commit domestic violence. Such arguments were proper under section 1109.

Finally, defendant mounts a facial constitutional challenge to section 1109, claiming the admission of prior acts of domestic violence constitutes a violation of due process. In *People v. Falsetta* (1999) 21 Cal.4th 903, the Supreme Court held section 1108, which permits admission of past sexual offenses as propensity evidence, did not offend due process because the statute has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in an unfair trial. (*Falsetta*, at p. 917.) Section 1109 contains similar safeguards. Moreover, while the Supreme Court has not specifically ruled on the constitutionality of section 1109, "the Courts of Appeal . . . have uniformly followed the reasoning of *Falsetta* in holding section 1109 does not offend due process." (*People v. Johnson*, *supra*, 185 Cal.App.4th at p. 529.)

***Prosecutor's Arguments on the Burden of Proof***

Defendant contends the prosecutor's closing arguments also misled the jury about the burden of proof and the reasonable doubt standard.

During closing, the prosecutor argued: "We talk about proof beyond a reasonable doubt. This is what the CALCRIM says. This is what the instructions that you're going to be given say. [¶]. . . When you have two reasonable possibilities, two possible ways of viewing the evidence. . . . And both possibilities are reasonable. One of those possibilities point to guilty and one of them points to innocence, and they are both reasonable, you have to accept the one, the explanation, that points to innocence, and

disregard the one that points to guilt. If they are both reasonable. Not just if they are both possible, but if they are both reasonable. [¶] But if you have got two possible explanations, two possible interpretations, and one of them is not reasonable, you have to disregard it and go with the one you're left with, the reasonable explanation. That's what proof beyond a reasonable doubt means. It's not proof beyond all possible doubt." Defense counsel objected, unsuccessfully, on grounds the prosecutor had misstated the law.

The prosecutor continued: "It's not proof beyond all possible doubt because, as the instruction says, everything in life is open to some doubt. It's to a reasonable doubt. [¶] And the explanation that I give, and it's silly, is we have all been drinking out of our respective thermoses, and I'll pour here. And I have been drinking out of mine, too. And you see it's a clear liquid. And I'm drinking it. And you assume that it's water, because it's clear, and yours is water, and I have been drinking and . . . I have been behaving somewhat normally. But you don't know beyond all possible doubt that what I have got in my thermos there is water. Could be something else. Could be, you fill in the blank. Right. Could be alcohol. Could be gin, could be vodka, could be whatever. It's possible. [¶] But is that reasonable that I would have snuck in alcohol into my thermos as I'm prosecuting this case? Absolutely not. Just because something is open to a possible doubt does not mean it's open to a reasonable doubt. So that's the standard we're looking at, ladies and gentlemen."[2]

Defendant contends the prosecutor's argument confounded the concept of rejecting unreasonable inferences with the standard of proof beyond a reasonable doubt. He also asserts the argument flouted the burden of proof by telling the jury it was appropriate to evaluate evidence by relying on their assumptions in the absence of contrary evidence. Specifically, defendant takes issue with the prosecutor's contention that, in his hypothetical, the jury could assume the thermos contained water. Defendant maintains this argument flipped the presumption of innocence on its head.

[2] Defense counsel did not make another objection after the prosecution posed this hypothetical.

Defendant waived the argument he now advances on appeal, as he never objected to the prosecutor's argument on this basis. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841 ["[D]efendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."].)

In any case, the prosecutor's argument did not rise to the level of misconduct. "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.)

"[I]t is improper for the prosecutor to misstate the law generally [citations], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) For example, "it is error for the prosecutor to suggest that a 'reasonable' account of the evidence satisfies the prosecutor's burden of proof." (*People v. Centeno* (2014) 60 Cal.4th 659, 672, italics omitted.) However, it is not improper for the prosecutor to ask the jury to " 'decide what is reasonable to believe versus unreasonable to believe' and to 'accept the reasonable and reject the unreasonable.' " (*People v. Romero* (2008) 44 Cal.4th 386, 416.)

Here, the prosecutor's thermos hypothetical was not close to a model of clarity and may even have been unhelpful in explaining the concept of reasonable doubt. The prosecutor was trying to describe the difference between reasonable doubt and all possible doubt. But his argument became hopelessly muddled when he apparently tried

to analogize a guilty verdict to a finding that the liquid in his thermos was water. Nevertheless, this isolated argument did not rise to the level of prosecutorial misconduct. To the extent the jury could understand the prosecutor's hypothetical, it would not have misled it as to the prosecution's burden of proof, especially since the prosecutor's other comments about the beyond a reasonable doubt standard were accurate. The prosecutor correctly argued that, in the event there were "two reasonable possibilities," and one pointed to guilt and the other innocence, the jury should accept the one that pointed to innocence. The prosecutor also correctly stated he did not need to prove his case beyond all possible doubt. The trial court also correctly instructed the jury: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt." In light of these statements, and the fact no clear principle can be gleaned from the prosecutor's confusing hypothetical, the prosecutor's comments did not "infect" the trial with unfairness.

***Instructional Error***

Finally, defendant maintains the trial court erred in giving, over his objection, a modified version of CALCRIM No. 3476, which stated the owner of property may use reasonable force to protect the property from immediate or imminent harm. Defendant claims this instruction gave the jury the improper impression Pamela was entitled to use force to retake her cell phone from defendant and defendant's claim of self-defense was barred.

An argument similar to defendant's, was rejected in *People v. Watie* (2002) 100 Cal.App.4th 866. In that case, the defendant stood outside the victim's home and argued with the victim through a security door. (*Id.* at p. 873.) The defendant shot and killed the victim, and later claimed self-defense, asserting he believed the victim had a rifle or shotgun and was going to kill him. (*Id.* at pp. 874, 876.) The trial court instructed the jury the lawful occupant of a residence has a right to use reasonable force to eject a trespasser. (*Id.* at p. 876) Defendant challenged this instruction on appeal, arguing it allowed the jury to presume the victim was acting in lawful defense of his property and

removed the defense of actual self-defense from the jury's consideration. (*Ibid*.) The court found the instruction correctly stated the law: "If [the victim] had a right to use force to defend himself in his home, then defendant had no right of self-defense, imperfect or otherwise." (*Id.* at p. 878.)

In his reply brief, defendant further asserts the challenged instruction was inappropriate because there is no right to use force to recover loaned property. Defendant relies on *Deevy v. Tassi* (1942) 21 Cal.2d 109, where the Supreme Court, quoting from the Restatement of Torts, section 108, held: " 'The use of force against another for the purpose of recaption of a chattel, which the other is tortiously withholding from the actor, is not privileged if the other's possession was rightfully acquired.' "[3] (*Deevy v. Tassi*, at p. 118.) Defendant claims he was in rightful possession of the phone because Pamela loaned it to him. Defendant waived this argument by failing to raise it below or in his opening brief. (See *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9.) In any event, to the extent this principle of tort law applies in the criminal context, it is not clear defendant had rightful possession of the phone, as Pamela testified she merely let him use it to call into work. There is no indication Pamela lent defendant the phone or gave him permission to keep it. (See Rest.2d Torts, § 108, com. b, p. 186 [rule stated in the section "does not apply where the other, having rightfully acquired the custody, wrongfully takes possession"].)

Any error, moreover, was harmless. Even with the challenged instruction, the jury was permitted to consider defendant's self-defense claim, as the trial court instructed the jury on that theory. There also was overwhelming evidence to support a finding defendant did not act in lawful self-defense. Pamela testified defendant attacked her.

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[3] In *Deevy v. Tassi*, the defendants assaulted the plaintiffs while attempting to take possession of cattle which had been offered as security for a chattel mortgage on which the plaintiffs had allegedly defaulted. (*Deevy v. Tassi*, *supra*, 21 Cal.2d at pp. 113–116.) The court held the assumed fact that the defendants had a legal right to acquire possession of the cattle did not justify the commission of assault and battery in effecting recaption, since the torts were committed while the cattle were still in the plaintiffs' barn and clearly were in their possession. (*Id.* at pp. 118–119.)

She also testified she reached for her phone, but did not hit him. Defendant asserted Pamela was aggressive and swung at him in attempt to recover her phone. But in light of defendant's long and sustained history of domestic violence, as well as the fact he choked Pamela unconscious rather than merely returning the phone to her, the jury reasonably rejected his testimony. Defendant's claims were further undermined by Sansen, who testified defendant's injuries were indicative of offensive wounds.

## DISPOSITION

The judgment is affirmed.

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Banke, J.

We concur:

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Humes, P.J.

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Margulies, J.

A146382, *People v. Buffin*